

228933

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CARGILL, INCORPORATED
15407 McGinty Road West
Wayzata, Minnesota 55391-2398

Complainant,

v.

BNSF RAILWAY COMPANY
2650 Lou Menk Drive
Fort Worth, Texas 76131-2830

Defendant.

Docket No. 42120

ENTERED
Office of Proceedings

MAR 4 - 2011

Part of
Public Record

SUPPLEMENT TO COMPLAINT

OF COUNSEL:

Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington D.C. 20036

Dated: March 4, 2011

CARGILL, INCORPORATED

By: John H. LeSeur
Peter A. Pfohl
Daniel M. Jaffe
Stephanie M. Adams
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170
Attorneys for Complainant

CARGILL, INCORPORATED
15407 McGinty Road West
Wayzata, Minnesota 55391-2398

v.

BNSF RAILWAY COMPANY
2650 Lou Menk Drive
Fort Worth, Texas 76131-2830

COMES NOW Cargill, Incorporated (“Cargill”) to file this Supplement to the Complaint Cargill filed on April 19, 2010 under 49 U.S.C. § 11701(b) seeking the prescription of reasonable fuel surcharge practices and monetary damages. In support hereof, Cargill states as follows:

1. In paragraph 5 of the Complaint, Cargill alleged that BNSF was invoicing, and Cargill was paying, a fuel surcharge on Cargill's common carrier transportation services under a tariff denominated as BNSF Rules Book 6100-A, Item 3375L, Section B. Cargill defined this tariff item "and its predecessor and successor iterations" as the "Assailed Tariff Item."

2. Cargill alleged in its Complaint that BNSF's collection of fuel surcharges under the Assailed Tariff Item for Cargill's common carrier traffic constituted an unreasonable practice under 49 U.S.C. § 10702(2) for the reasons set forth in paragraphs 6, 7, and 8 of the Complaint.

3. In paragraph 9 of its Complaint, Cargill stated that "[t]his Complaint covers any changes to, or modifications of, the Assailed Tariff Item that BNSF may establish during the course of this proceeding."

4. In its prayer for relief, Cargill requested, *inter alia*, that the Board investigate its Complaint; find that the assailed fuel surcharge practices are unreasonable; prescribe reasonable fuel surcharge practices; and award Cargill damages. Complaint at 4-5 (WHEREFORE ¶).

5. On December 17, 2010, Defendant BNSF Railway Company ("BNSF") published a notice on its website (copy in Attachment 1) stating that "BNSF's strike price for our fuel surcharge program will be reset from \$1.25 per gallon to \$2.50 per gallon beginning January 2011" and that "[t]ariff changes for Agricultural Products customers are targeted for early March 2011."

6. Cargill is an Agricultural Products customer of BNSF and pays fuel surcharges on common carrier transportation of Agricultural Products. See Complaint ¶ 4.

7. BNSF has published a tariff item, currently set forth in BNSF Rules Book 6100-A, Item 3376D, Section B (copy in Attachment 2), that contains a mileage-based fuel surcharge with a strike price of \$2.50 per gallon.

8. Counsel for BNSF has informed counsel for Cargill that BNSF does not believe the Complaint covers Item 3376D, Section B.

9. While Cargill believes that Item 3376, Section B (or any other rebased fuel surcharge that might be applied to its common carrier traffic) is a "successor" to Item 3375L, Section B, Cargill hereby expressly supplements its Complaint to include, as an "Assailed Tariff Item" under Paragraph 5 of the Complaint, Item 3376D Section B (including successor iterations), or any other rebased version of Item 3375L, Section B (regardless of its numerical designation) that is applied to Cargill's common carrier shipments during the pendency of this case.

10. As supplemented, Cargill's allegations of unreasonable practices set forth in paragraphs 6, 7, and 8 of its Complaint, as well as its prayer for relief, apply to the Assailed Tariff Item as supplemented in paragraph 9 above.

11. The Board dismissed paragraph 8 of Cargill's Complaint in its decision served on January 4, 2010. Cargill's petition seeking reconsideration of that decision is pending before the Board.


Respectfully submitted,

CARGILL, INCORPORATED

OF COUNSEL:

Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington D.C. 20036

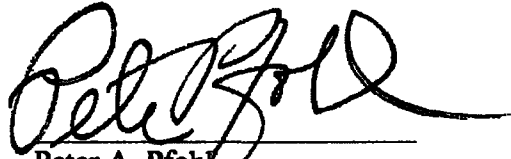
Dated: March 4, 2011

By: John H. LeSeur 
Peter A. Pfohl
Daniel M. Jaffe
Stephanie M. Adams
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170
Attorneys for Complainant

CERTIFICATE OF SERVICE

Pursuant to 49 C.F.R. § 1111.3, I hereby certify that I have this 4th day of March, 2011 caused to be served copies of the foregoing Supplement to Complaint on the following by hand delivery:

Samuel M. Sipe, Jr.
Anthony J. LaRocca
Linda S. Stein
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington DC 20036


Peter A. Pfohl
An Attorney for Complainant



Ag Marketing Pricing News

12/17/2010

Ag Fuel Surcharge Implementation - Clarification

BNSF's strike price for our fuel surcharge program will be reset from \$1.25 per gallon to \$2.50 per gallon beginning January 2011. Tariff changes for Agricultural Products customers are targeted for early March 2011. Please refer to the \$1.25 per gallon fuel surcharge rates until the tariff revision is published. Contracts will be addressed as they renew.

Tables reflecting the new strike price and other program details are available on the BNSF website at <http://www.bnsf.com/customers/fuel-surcharge/>.

If you have any questions, please call your representative.

Your business is important to us. Thank you for choosing BNSF as your transportation service provider.

If you have any questions, please send an e-mail to CustomerNotifications@bnsf.com

Terms of Use | Privacy Policy | Contact Us | Site Map | Feedback
Report Railroad Emergencies: 800-832-5452 | General Inquiries
©2011 BNSF Railway Company. All Rights Reserved.



**BNSF RAILWAY COMPANY
BNSF RULES BOOK 6100-A
(Cancels BNSF Rules Book 6100)**

**CONTAINING
RULES, REGULATIONS AND SPECIAL CHARGES
GOVERNING
THE TRANSPORTATION OF FREIGHT
ON
BNSF RAILWAY COMPANY
IN
THE UNITED STATES, MEXICO AND CANADA
AND
REGULATIONS GOVERNING CURRENCY EXCHANGE ON TRAFFIC
FROM, TO AND BETWEEN STATIONS IN CANADA
AND
CAR HIRE ON TRAFFIC TO OR FROM MEXICO**

For explanation of abbreviations / reference marks, see Item 110

ALSO APPLICABLE ON INTRASTATE TRAFFIC

ISSUED DECEMBER 29, 2000

EFFECTIVE JANUARY 1, 2001

Issued by J. C. Engstrom, P. O. Box 961069, Ft. Worth, TX 76161-0069

BNSF Rules Book 6100 – A

***Item 3376-D - Charge – Carload Percentage Based and Mileage Based Fuel Surcharge (\$2.50 Strike Price)
Issued December 1, 2010 – Effective January 1, 2011 (Increase)***

General – Refer to Item 3374 for General Rules and Methodology for calculating the fuel surcharge.

- **Section A** of this item contains the Percentage Based Fuel Surcharge
- **Section B** of this item contains the Mileage Based Fuel Surcharge

Section A: Percentage Based Fuel Surcharge:

Application - Applies on the following carload shipments:

- **EXEMPT** shipments, not moving under contracts/private price authorities (except as otherwise provided):
 - For a list of Exempt Commodities, please refer to 49 CFR 1039, which is available online at http://www.access.gpo.gov/nara/cfr/waisidx_00/49cfr1039_00.html
 - Including shipments in boxcars.
- Or, Shipments moving under contracts/private price authorities with an effective date of 1/1/2011 or after unless otherwise stated.
- Or, Shipments moving under price authorities referring specifically to this item (3376 Section A).
- Except Agricultural Commodities. For a list of agricultural commodities, please refer to BNSF web page at [Agricultural Commodities](#).

A fuel surcharge applies as shown in the Fuel Surcharge Table in this section.

When the U. S. Average Price of Retail On-Highway Diesel Fuel (HDF) monthly average equals or exceeds \$2.50 per gallon;

- A positive fuel surcharge will apply on the applicable linehaul freight charges.
- The fuel surcharge will be included as a separate line item on the invoice for freight charges for each shipment.

When the U. S. Average Price of Retail On-Highway Diesel Fuel (HDF) monthly average is less than \$2.50 per gallon and equals or exceeds \$1.25 per gallon;

- When BNSF is the collecting carrier of linehaul freight charges, a negative fuel surcharge will apply only on BNSF's portion of the linehaul freight charges unless otherwise stated.
- A negative fuel surcharge will not be assessed to other carriers' portions of the linehaul freight charges, and their portions will not be included in the calculation.
- The negative fuel surcharge will be included as a deduction in a separate line item on the invoice for freight charges for each shipment.
- When BNSF is not the collecting carrier of linehaul freight charges, no negative fuel surcharge will apply.

(Item continued on next page)

BNSF Rules Book 6100 – A**Item 3376-D – Charge- Carload Percentage Based and Mileage Based Fuel Surcharge (\$2.50 Strike Price)
(Item Continued)****Section A: Percentage Based Fuel Surcharge**

Carload Percentage Based Fuel Surcharge Table			
Time Periods Average Price of HDF Between	Applicable Fuel Surcharge	Time Periods Average Price of HDF Between	Applicable Fuel Surcharge
Each \$0.05 HDF per gallon decrease thereafter to \$1.25	Decrease 0.5%	\$2.90 to \$2.949	4.5%
\$1.70 to \$1.749	-7.5%	\$2.95 to \$2.999	5.0%
\$1.75 to \$1.799	-7.0%	\$3.00 to \$3.049	5.5%
\$1.80 to \$1.849	-6.5%	\$3.05 to \$3.099	6.0%
\$1.85 to \$1.899	-6.0%	\$3.10 to \$3.149	6.5%
\$1.90 to \$1.949	-5.5%	\$3.15 to \$3.199	7.0%
\$1.95 to \$1.999	-5.0%	\$3.20 to \$3.249	7.5%
\$2.00 to \$2.049	-4.5%	\$3.25 to \$3.299	8.0%
\$2.05 to \$2.099	-4.0%	\$3.30 to \$3.349	8.5%
\$2.10 to \$2.149	-3.5%	\$3.35 to \$3.399	9.0%
\$2.15 to \$2.199	-3.0%	\$3.40 to \$3.449	9.5%
\$2.20 to \$2.249	-2.5%	\$3.45 to \$3.499	10.0%
\$2.25 to \$2.299	-2.0%	\$3.50 to \$3.549	10.5%
\$2.30 to \$2.349	-1.5%	\$3.55 to \$3.599	11.0%
\$2.35 to \$2.399	-1.0%	\$3.60 to \$3.649	11.5%
\$2.40 to \$2.449	-0.5%	\$3.65 to \$3.699	12.0%
\$2.45 to \$2.499	0.0%	\$3.70 to \$3.749	12.5%
\$2.50 to \$2.549	0.5%	\$3.75 to \$3.799	13.0%
\$2.55 to \$2.599	1.0%	\$3.80 to \$3.849	13.5%
\$2.60 to \$2.649	1.5%	\$3.85 to \$3.899	14.0%
\$2.65 to \$2.699	2.0%	\$3.90 to \$3.949	14.5%
\$2.70 to \$2.749	2.5%	\$3.95 to \$3.999	15.0%
\$2.75 to \$2.799	3.0%	\$4.00 to \$4.049	15.5%
\$2.80 to \$2.849	3.5%	\$4.05 to \$4.099	16.0%
\$2.85 to \$2.899	4.0%	Each \$0.05 HDF per gallon increase	Additional .5%

(Item continued on next page)

BNSF Rules Book 6100 – A

***Item 3376-D – Charge - Carload Percentage Based and Mileage Based Fuel Surcharge (\$2.50 Strike Price)
(Item Continued)***

Section B: Mileage Based Fuel Surcharge:

Application - Applies on the following carload shipments:

- Regulated shipments (except as otherwise provided):
 - When an Item covering BNSF Fuel Surcharge refers to Regulated Commodities, it refers to all commodities except those that are EXEMPT; for a list of EXEMPT commodities, please refer to 49 CFR 1039, which is available online at:
http://www.access.gpo.gov/nara/cfr/waisidx_00/49cfr1039_00.html
 - Excluding shipments in boxcars.
- Or Agricultural Commodities (including regulated and exempt shipments). For a list of agricultural commodities, please refer to BNSF web page at [Agricultural Commodities](#). See Geographical Definitions and Exceptions below.
- Or Shipments moving under pricing authorities referring specifically to this item (3376 Section B).

A fuel surcharge applies as shown in the Fuel Surcharge Table in this section.

When the U. S. Average Price of Retail On-Highway Diesel Fuel (HDF) monthly average equals or exceeds \$2.50 per gallon;

- A positive fuel surcharge will apply on the applicable linehaul freight charges.
- The fuel surcharge will be included as a separate line item on the invoice for freight charges for each shipment.

When the U. S. Average Price of Retail On-Highway Diesel Fuel (HDF) monthly average is less than \$2.50 per gallon and equals or exceeds \$1.25 per gallon;

- When BNSF is the collecting carrier of linehaul freight charges, a negative fuel surcharge will apply only on BNSF's portion of the linehaul freight charges unless otherwise stated.
- A negative fuel surcharge will not be assessed to other carriers' portions of the linehaul freight charges, and their portions will not be included in the calculation.
- The negative fuel surcharge will be included as a deduction in a separate line item on the invoice for freight charges for each shipment.
- When BNSF is not the collecting carrier of linehaul freight charges, no negative fuel surcharge will apply.

Geographical Definitions and Exceptions –

- For Agricultural Commodities only:
 - Pacific North West (PNW) export destinations will be grouped using Seattle, WA as destination upon which the mileage based fuel surcharge will be calculated for all whole grain (STCC 011) shipments from all BNSF origin states except California, Oregon, or Washington.
 - Export destinations will be as follows: PNW Group: Rivergate, OR, Portland, OR, Kalama, WA, Longview, WA, Seattle, WA, Tacoma, WA and Vancouver, WA. As an example, the fuel surcharge from Alton, ND to Vancouver, WA will be calculated using the miles from Alton, ND to Seattle, WA (1,496 miles).
 - Texas Gulf export facilities will be grouped using Houston, TX as the destination upon which the mileage based fuel surcharge will be calculated for all whole grain (STCC 011 and STCC 2041979) shipments.
 - Export destinations will be as follows: Texas Gulf Group: Beaumont, Corpus Christi, Galena Park, Galveston, Houston and Port of Brownsville, TX. Shipments must be unloaded at these destinations. As an example, the fuel surcharge from Wichita, KS to Galveston, TX will be calculated using the miles from Wichita, KS to Houston, TX (632 miles).

(Item continued on next page)

BNSF Rules Book 6100 – A**Item 3376-D - Charge – Carload Percentage Based and Mileage Based Fuel Surcharge (\$2.50 Strike Price)
(Item Concluded)****Section B: Mileage Based Fuel Surcharge**

Carload Mileage Based Fuel Surcharge Table			
Price of HDF. Between	Fuel Surcharge Cents per Mile	Price of HDF Between	Fuel Surcharge Cents per Mile
Each \$0.04 HDF per gallon decrease thereafter to \$1.25	Decrease 0.01 per mile	\$2.98 to \$3.019	0.13
\$1.90 to \$1.939	-0.14	\$3.02 to \$3.059	0.14
\$1.94 to \$1.979	-0.13	\$3.06 to \$3.099	0.15
\$1.98 to \$2.019	-0.12	\$3.10 to \$3.139	0.16
\$2.02 to \$2.059	-0.11	\$3.14 to \$3.179	0.17
\$2.06 to \$2.099	-0.10	\$3.18 to \$3.219	0.18
\$2.10 to \$2.139	-0.09	\$3.22 to \$3.259	0.19
\$2.14 to \$2.179	-0.08	\$3.26 to \$3.299	0.20
\$2.18 to \$2.219	-0.07	\$3.30 to \$3.339	0.21
\$2.22 to \$2.259	-0.06	\$3.34 to \$3.379	0.22
\$2.26 to \$2.299	-0.05	\$3.38 to \$3.419	0.23
\$2.30 to \$2.339	-0.04	\$3.42 to \$3.459	0.24
\$2.34 to \$2.379	-0.03	\$3.46 to \$3.499	0.25
\$2.38 to \$2.419	-0.02	\$3.50 to \$3.539	0.26
\$2.42 to \$2.459	-0.01	\$3.54 to \$3.579	0.27
\$2.46 to \$2.499	0.00	\$3.58 to \$3.619	0.28
\$2.50 to \$2.539	0.01	\$3.62 to \$3.659	0.29
\$2.54 to \$2.579	0.02	\$3.66 to \$3.699	0.30
\$2.58 to \$2.619	0.03	\$3.70 to \$3.739	0.31
\$2.62 to \$2.659	0.04	\$3.74 to \$3.779	0.32
\$2.66 to \$2.699	0.05	\$3.78 to \$3.819	0.33
\$2.70 to \$2.739	0.06	\$3.82 to \$3.859	0.34
\$2.74 to \$2.779	0.07	\$3.86 to \$3.899	0.35
\$2.78 to \$2.819	0.08	\$3.90 to \$3.939	0.36
\$2.82 to \$2.859	0.09	\$3.94 to \$3.979	0.37
\$2.86 to \$2.899	0.10	\$3.98 to \$4.019	0.38
\$2.90 to \$2.939	0.11	\$4.02 to \$4.059	0.39
\$2.94 to \$2.979	0.12	Each \$0.04 HDF per gallon increase	Additional \$0.01 per mile